Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telephone Company Cable Television Cross-Ownership Rules, Section 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

REPLY COMMENTS OF GTE

GTE Service Corporation and its affiliated domestic telephone operating companies

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SUMMARY

Adherence to a "flexible regulatory policy" dictates that the Commission need not create overly burdensome rules and policies for video dialtone (VDT). LECs introducing VDT services will be non-dominant providers of video distribution services in local markets. If VDT is to be successful in offering consumers enhanced services and laying the foundation for the national information infrastructure (NII), VDT offerings must be allowed to evolve in accordance with market demand and technological developments. New programming services offered via VDT must achieve consumer acceptance quickly if they are to compete with existing cable offerings. Comments submitted in response to capacity issues raised in the *Third Notice* demonstrate widespread industry support for permitting LECs to implement channel sharing arrangements in order to resolve analog capacity issues. The Commission's current regulatory framework can be adequately used to judge the reasonableness of LEC channel sharing and allocation plans on a case-by-case basis.

Market conditions should be the determining factor as to when and where LEC acquisition of cable facilities by a LEC are desirable. The restriction on acquisitions and joint construction, like the ban on LEC video programming, no longer serves a compelling public need. Cable operators and telephone companies should be permitted to enter into joint construction projects if such efforts are economically beneficial.

The Commission should also permit LECs to voluntarily provide VDT network access to local governmental entities on terms and conditions that best suits the needs of the local communities as well as its own business plans. Consumer preferences will

dictate that programmers deliver the types of video services consumers want, which will undeniably include local commercial and noncommercial broadcast stations. There is no justification for importing an equivalent of the cable "must-carry" rules, which themselves have yet to be fully justified within a monopolistic setting, into a competitive common carrier regulatory framework.

Finally, the Commission should rely on its existing complaint procedures in processing pole attachment grievances and limit Section 214 reviews to the determination of whether a LEC's 214 application for VDT is economically justified and in the public interest. The cable industry has consistently endorsed any suggestion that would increase Section 214 VDT filing requirements and potentially delay their approval. The proposals of various cable interests to saddle LECs with onerous reporting, notification, complaint and rate approval requirements relating to pole attachment and conduit access would seriously compromise the Commission's video dialtone objectives and policies.

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GTE Service Corporation, on behalf of its affiliated domestic telephone operating companies (GTE), hereby offers its Reply Comments in response to the Commission's Memorandum Opinion and Order on Reconsideration (*Reconsideration Order*) and Third Further Notice of Proposed Rulemaking (*Third Notice*) released November 7, 1994 in the above-captioned proceeding. In the *Third Notice*, the Commission identified four areas within its overall video dialtone (VDT) regulatory framework for which additional public comment is appropriate: capacity issues; modifications to the prohibition on local exchange carrier (LEC) acquisitions of cable facilities; preferential access proposals; and pole attachment and conduit rights. GTE submits its reply to comments submitted by interested parties with respect to these issues.

I. CAPACITY ISSUES

In its Comments submitted in response to the *Third Notice*, GTE demonstrated the need to maintain a flexible regulatory approach to VDT. LECs introducing VDT

services will be non-dominant providers of video distribution services in local markets. If VDT is to be successful in offering consumers enhanced services and laying the foundation for the national information infrastructure (NII) despite the entrenched monopoly position of existing cable systems, VDT offerings must be allowed to evolve in accordance with market demand and technological developments. New programming services offered via VDT must achieve consumer acceptance quickly if they are to compete with existing cable offerings and as well as emerging Direct Broadcast Satellite (DBS) services. *See. e.g.*, Comments of Ameritech, at 2, and Southwestern Bell Corporation (SBC), at 5. VDT customers-programmers must be allowed to forge service packages that rely on analog channel capabilities since it is those capabilities that the majority of customers currently receive through existing cable offerings. As digital capabilities are enhanced and become economically feasible, reliance on analog capacities will be reduced.

GTE fully concurs with the majority of commenters that the Commission must not dictate the specific VDT platform technology to be used.[1] The Commission has recognized the benefits inherent in GTE's original VDT implementation plans that would make extensive use of digital technology. *Third Notice*, at ¶ 270. GTE expects that the required digital compression equipment will be commercially available during the build-

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[1] *See, e.g.*, Comments of The Consumer Electronics Group of Electrical Industry Associations (CEG), at 5; Comments of AT&T, at 5; Comments of United and Central Telephone Companies, at 5; Comments of BellSouth, at 1; Comments of Bell Atlantic, at 3. *Compare* Comments of BroadBand Technologies, Inc. (which self-servingly attempts to convert the *Third Notice* into a mandate to require all-digital VDT systems and thus further its marketing plans).

out phases of GTE's networks. *See also* Comments of Compression Labs, Inc., at 4-6. However, after extensive investigation, GTE has concluded that reliance on digital set-top equipment may not prove to be economically viable in the initial development phases of GTE's VDT deployment. GTE Comments, at 8-11. Consequently, GTE has filed amendments to its Section 214 Applications reflecting a revised plan which will make use of analog and combined analog/digital set top boxes.[2]

Similarly, comments submitted in response to capacity issues raised in the *Third Notice* demonstrate widespread industry support for permitting LECs to implement channel sharing arrangements in order to resolve analog capacity issues. *See, e.g.*, AT&T, at 6; Liberty Cable, at 3; Viacom, at 8-9; NYNEX, at 4. The varying technological characteristics of LEC offerings have produced many different but equally feasible plans designed to enhance the efficient use of the VDT platform. Such arrangements must reasonably be designed in accordance with each LEC's network architecture and unique business needs. Consequently, the public interest requires (and the record in this proceeding does not demonstrate to the contrary) that the Commission forebear from mandating any specific allocation or sharing plan. Thus, there is no need to establish any specific policies and rules relative to the operation of such plans. The Commission's current regulatory framework can be adequately used to judge the reasonableness of LEC channel sharing and allocation plans on a case-by-case basis.

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[2] Amendments of GTE South, Inc., doing business as GTE Virginia, W-P-C 6955; GTE Florida, Inc., W-P-C 6956; GTE California, Inc., W-P-C 6957; and GTE Hawaiian Telephone Company, Inc., W-P-C 6958, December 16, 1994.

Channel sharing arrangements do not conflict with the basic common carrier obligations of the LECs.[3] The Commission has already established a number of policies and rules which adequately provide a necessary regulatory framework which can govern the adherence of channel sharing arrangements to meet Commission objectives: that the VDT provider not allocate all or "substantially all" analog capacity to a single programmer; that VDT systems be expanded as technically feasible and economically reasonable; that shared channels be made available to all interested programmers under similar terms, conditions and rates; and that programmers be ultimately responsible for the selection, charging, and control of video programming to subscribers. *See* NYNEX, at 12-13. Indeed, the Commission effectively used this criteria in approving channel allocation plans of Ameritech, US West and SNET.[4]

GTE's proposed analog channel sharing and allocation approach complies with these regulatory policies. GTE will not permit any customer-programmer to purchase more than 60% of analog channel capacity, exclusive of shared channels.[5] Shared

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[3] Channel sharing arrangements also do not violate the video programming ban, 47 U.S.C. § 533(b), to the extent that this unconstitutional statute might have any remaining viability as to those few companies which have not yet received judicial relief from the ban.

[4] *In re the Applications of Ameritech Operating Companies*, Order and Authorization, FCC 94-340, January 4, 1995, at ¶ 23; *In re the Applications of U S West Communications, Inc.*, Order and Authorization, FCC 94-350, January 6, 1995, at ¶ 16 (*US West Authorization*); *In re The Southern New England Tel. Co.*, 9 FCC Rcd 1019, 1022 n.46 (1993).

[5] However, GTE has proposed that in order to foster full utilization of the network and offer the broadest array of services to consumers, analog channel capacity unused after 6 months (if any) may be allocated to requesting customer-programmers on a non-discriminatory first-come, first-served basis; provided that the customer-programmer(s) agrees to timely relinquish channels above the 60% limitation if other customer-programmers request them and capacity is lacking.

channels are defined as those channels designated by any customer-programmer for transport of the signals of local commercial television stations (47 U.S.C.§ 534(h)(1)), qualified noncommercial educational television stations (47 U.S.C.§ 535(l)(1)), and those channels voluntarily made available by GTE to local governmental entities.

In unconstructive comments, the cable cartel (*e.g.*, NCTA, at 16, and CCTA, at 10) generally allege that LEC channel sharing proposals impermissibly place the LEC in the role of selecting and determining programming to be made available to subscribers. This is nonsense. The designation of a channel as shared if carried by one or more programmers does not place the VDT platform provider in the position of exercising any editorial control over the programming decisions of customer-programmers. Indeed, in a recent order the Commission forcefully rejected the tired contention argument that establishment of shared/common channels constitutes prohibited programming, stating that: "Although U S West proposes to designate capacity for certain types of use by customer-programmers, i.e., common, shared, or non-shared, we find that the designation of these channels does not constitute determining how programming is presented for sale to subscribers." *U S West Authorization*, at ¶ 18.

By defining shared channels based on existing regulatory criteria, GTE will not be placed in the position of making decisions regarding channel selection. Moreover, GTE's channel sharing proposal does not require the use of a channel administrator or manager. The decision to offer any shared channels to local subscribers will be the sole responsibility of each programmer. GTE will not be engaged in the selection, charging or control of shared programming services to subscribers.

In addition, shared channels will be made available to any and all programmers on a non-discriminatory basis. GTE agrees with NCTA (at 14) that the best way to effectuate a channel sharing arrangement would be to allow the market (*i.e.*, customer-programmers) to decide the costs or benefits of utilizing a shared channel approach. However, GTE disagrees that LEC proposals that define shared channels as local broadcast or noncommercial educational stations effectively discriminate against any class or category of programmer. Those programmers that desire to deliver local broadcast-type channels as part of a package of video programming services will be able to do so. Likewise, other programmers that prefer to offer their services on an individualized basis will be afforded equal opportunity to lease analog channels on GTE's networks. No programmer is required to subscribe to any of the shared channels to gain access to GTE's VDT platform. In fact, GTE's channel allocation and channel sharing plan insures that sufficient capacity will be available to serve multiple video programmers.

Adherence to a "flexible regulatory policy" dictates that the Commission need not create detailed rules and policies regarding channel sharing. Rather, the proliferation of additional regulatory constraints on VDT would only lead to the demise of a robust competitive market in the delivery of video services.[6] LECs should be allowed to

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[6] Several commenters have aptly noted that with the removal of the ban on LEC provision of programming services directly to subscribers, the creation of additional regulatory constraints on VDT development will only produce strong incentives for LECs to bypass the common carrier VDT model in favor of the provision of traditional cable service under Title VI regulation. U S West, at 4-5; SBC, at 2. Although this approach would introduce a new competitor within existing cable markets, it falls far short of achieving the type of consumer benefits envisioned under the Commission's open network video dialtone model.

propose, and the Commission has sufficient regulatory tools to judge, reasonable channel allocation and sharing plans in their Section 214 and tariff submissions.

II. ACQUISITION OF CABLE FACILITIES

The common carrier video platforms that LECs will deploy have decided advantages for consumers over traditional closed cable systems. Provision of video services via a common carrier platform open to all customer-programmers provides the best opportunity to expand the diversity and availability of advanced video services to the public. Freedom to acquire the needed facilities to provide VDT services in any size market is needed if these results are expected to be achieved on a widespread basis.

Market conditions should be the determining factor as to when and where LEC acquisition of cable facilities are desirable. GTE agrees with NCTA (at 32) that Commission rules "...should not flatly ban acquisitions in larger markets." Similarly, there is no valid reason to prohibit cable operators and telephone companies from entering into joint construction projects if such efforts are economically beneficial. *See* U S West, at 21. As several commenters observe, federal anti-trust laws work to provide an adequate check against any activities that could potentially impede competition in a given market. *See* U S West, at 20; NCTA, at 29.

GTE believes that the ban on acquisitions and joint construction no longer serves a compelling public need. Indeed, since this restriction is simply a permutation of the video programming ban, which has been declared unconstitutional on its face, the acquisition ban is similarly unconstitutional. Indeed, particularly in light of the constitutionally suspect nature of the current restrictions, the Commission must be

willing to readily accommodate "good cause" waivers of the rules where parties can demonstrate that such acquisitions or joint construction actually benefits local consumers in larger markets.

III. PREFERENTIAL ACCESS

Commenters representing various local governmental, media, and public broadcasting concerns insist that the Commission establish preferred VDT rates and access terms for non-profit and governmental entities providing noncommercial broadcasting.[7] These commenters are also joined by commercial interest which seek not only preferential "access" but mandatory carriage. (Comments of the National Association of Broadcasters.) Essentially, these parties contend that consumer access to diversity in programming would be threatened unless preferential access and/or mandatory carriage is required for a broad range of governmental, noncommercial and commercial programming entities and video content providers. In reality, however, with the competitive common carrier environment in which VDT will be offered, quite the opposite will be true.

By accommodating a multiplicity of programmers, VDT open network platforms will make available a broad range of programming options to consumers. GTE's proposed VDT offering will offer to all programmers a set of shared channels which can include certain types of noncommercial broadcasters and local commercial stations

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[7] *See* Comments of Association of America's Public Television Stations at 2; Center for Media Education, Consumer Federation of America, Media Access Project and People for the American Way at 2; Alliance for Community Media and the Office of Communication of the United Church of Christ ("PEG Access Coalition") at 6; and City of New York and the National Association of Telecommunications Officers and Advisors ("Local Governments") at 2.

currently benefiting from the cable "must carry" rules. Unlike entrenched cable operators which are gatekeepers as to what subscribers may watch, on a competitive open network VDT platform the market (*i.e.*, consumer preferences, not the caprices of monopoly cable providers) will dictate that programmers deliver the types of video services consumers want, which will undeniably include local commercial and noncommercial broadcast stations. Thus, it simply makes no sense to import an equivalent of the cable "must-carry" rules, which themselves have yet to be fully justified within a monopolistic setting, into a competitive common carrier regulatory framework. *See, e.g.*, SBC, at 13; AT&T, at 10.[8]

Many parties correctly observe that in order for the Commission to legally justify the imposition of a preferential access requirement, it must demonstrate an overwhelming public need that warrants the restriction of the speech of one group in order to promote the speech of another. U S West, at 27, AT&T, at 8. The Commission previously determined that no such public need existed. *Second Report and Order*, 7 FCC Rcd at 5804-5. Clearly, comments submitted in this proceeding reveal no factual evidence that consumer access to commercial, noncommercial or other nonprofit programming will be completely denied if preferential access to and/or mandatory carriage on VDT systems is not required.

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[8] The cable industry has vociferously challenged the "must carry" rules as content-based restrictions which cannot pass constitutional muster under any formulation. To the extent such "must carry" requirements were imprudently imposed upon VDT customer-programmers, or upon the VDT platform provider, they would clearly fail constitutional review. *See Turner Broadcasting System, Inc. v. F.C.C.*, __ U.S. __, 115 S.Ct. 30, 129 L.Ed.2d 127 (1994).

Although GTE believes the Commission lacks a public policy and legal foundation to mandate preferred access, in contrast voluntary business arrangements between LECs and local governmental entities are not *prima facie* unreasonable. LECs and customer-programmers may have a legitimate business interest in accommodating local municipality efforts to provide informational and educational services to their residents. GTE has proposed to provide a number of channels on its VDT networks to local governmental entities and proposes to include these channels as a component of the defined set of shared channels to be offered to programmers on the system. Local governments will be free to utilize these channels for public meetings, access to educational programming, or other uses as they chose; thus, GTE will have no editorial control over the programming presented.

No commercial VDT offering is fully operational at this time. Thus, it is entirely too early to ascertain whether VDT will fully satisfy each and every market need. However, the Commission should not prejudge the workings of the market by forcing LECs to provide a certain class or type of programming services. The Commission should permit LECs to voluntarily provide VDT network access to local governmental entities on terms and conditions that best suits the needs of the local communities as well as its own business plans.

IV. POLE ATTACHMENT AND CONDUIT RIGHTS

The comments of cable interests regarding the submission of pole attachment and conduit right attestations in Section 214 filings for VDT are predictable. *See* NCTA, at 32. The cable industry has consistently endorsed any suggestion that would increase Section 214 VDT filing requirements and potentially delay their approval.

Comments submitted by Pole Licensees[9] insist that extensive new regulations and rules be adopted which would significantly expand Section 214 filing requirements for VDT, impose new notice procedures on LECs proposing to construct VDT networks, establish expedited complaint proceedings, and require prior Commission approval of all pole attachment rate increases.

The majority of the Pole Licensees' demands are beyond the scope of this proceeding in that they seek to substantially re-write the Commission's pole attachment rules. The rules proposed by the Pole Licensees would effectively suspend any Commission action on a VDT Section 214 Application if a cable operator objects to any pole attachment rate or condition of the applicant. The adoption of these additional Section 214 regulations would seriously compromise the Commission's video dialtone objectives and policies. In effect, it would signal an open invitation to any competing cable operator to further delay the processing of Section 214 applications via the filing of frivolous complaints regarding any perceived dispute with a putative video dialtone provider.

The purpose of a Section 214 proceeding is to determine whether the proposed construction of a new interstate facility is economically justified and is in the public interest. The determination of whether a pole attachment charge has been properly computed should be made within existing complaint procedures and should have no

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[9] Pole Attachment Comments of Continental Cablevision, Inc., Greater Media, Inc, Jones Intercable, Inc.; Wester Communications, Inc.; Adelphia Cable Communications, Charter Communications Group, Community Cable TV, Prime Cable of Chicago, Inc.; The Florida Cable Television Association; The Cable Television Association of New York, Inc.; The Texas Cable TV Association (Pole Licensees).

direct bearing on assessing the public interest benefits of a Section 214 proposal. Realistically, the existing pole attachment rules and complaint procedures have adequately protected cable operators from unreasonable pole attachment conditions or rates for many years. *Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 FCC Rcd 5849, 5854 (1988); *Ameritech Corp. v. United States*, 1994 WL 635008 (N.D.Ill., Oct. 27, 1994). Neither NCTA nor the Pole Licensees offer anything to the contrary. Additional reporting requirements within the context of a Section 214 application would serve no useful purpose and would further complicate the regulatory approval process for VDT

The comments of the Pole Licensees cite recent pole attachment and conduit rental complaints filed by cable operators against GTE Hawaiian Telephone Company, Inc. (GTE Hawaiian Tel). Specific allegations raised by Pole Licensees in this proceeding are completely false and contain claims for which they have no first hand knowledge of the facts. GTE Hawaiian Tel has submitted extensive and detailed responses to these complaints demonstrating its strict compliance with Commission's pole attachment rules and policies.[10] GTE Hawaiian Tel's pole attachment and conduit rental rates, which have not been increased for many years, incorporate pole and conduit related costs only and are calculated using the Commission's pole attachment rate formula. These rates were revised to appropriately recover costs that should be

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[10] *See* Responses of GTE Hawaiian Telephone Company, Incorporated, P.A. No. 95-001, November 7, 1994; P.A. No. 95-002, November 23, 1994; P.A. No. 95-003, November 30, 1994; P.A. No. 95-004, December 5, 1994; P.A. No. 95-005, January 3, 1995. *See also* Surreply of GTE Hawaiian Telephone Company Incorporated, P.A. No. 95-001, December 20, 1994; and P.A. No. 95-002, December 21, 1994.

borne by cable television operators and not telephone ratepayers. Further, GTE Hawaiian Tel's operating practices with respect to the processing of pole attachment applications are entirely consistent with the terms and conditions of the pole attachment agreements negotiated with the individual cable operators themselves.

Claims that LECs can easily thwart competition in local markets from cable providers through increases in pole attachment rates are ludicrous. Cable operators currently have total monopoly control over wireline video distribution markets. *E.g., Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Dkt. 94-48, First Report, FCC 94-235 (released Sept. 28, 1994), ¶¶ 13, 141. Demands of NCTA and the Pole Licensees raised in this proceeding are but another attempt to significantly delay or prevent the delivery of competitive video programming services, such as video dialtone, to the American public.

V. CONCLUSION

LECs should be allowed to implement channel sharing arrangements on an individual basis as long as they comply with existing Commission policies regarding channel capacity and system expandability. Access to the VDT platform by local governmental entities may be provided on a voluntary basis by VDT providers, subject to conditions that best accommodates the needs of the local communities and the LEC's own business plans. The Commission cannot continue to support the ban on LEC acquisitions of cable facilities and therefore, at a minimum, must substantially

relax these rules. Finally, there is no necessity to further expand Section 214 filing requirements to report pole attachment and conduit access information.

Respectfully submitted,

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January 17, 1995

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply of GTE" have been mailed by first class United States mail, postage prepaid, on the 17th day of January, 1995 to all parties of record.

Ann D. Berkowitz